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Legal Sure 0f Preferent Creditors In Efforts Of Parate Executie Fiduciary Agreement According To Law Number 42 Year 1999 About Concerning Fiduciary Securities

[1] Rizky Andaru Setiawan , [2] Joko Ismono
[1.2] Master of Laws at Wijaya Putra University, Surabaya
Email: [1] r.andarus1902@gmail.com , [2] jokoismono@uwp.ac.id

Abstract

Fiduciary comes from the word fides meaning belief. Juridically, the Fiduciary Giver has transferred his material rights to the Fiduciary Giver giving the Fiduciary Giver the right to control the fiduciary guarantee object. Based on UUJF, it has been regulated to the execution of the Fiduciary Guarantee Object if the giver of fiduciary fails to promise by the execution of the executorial title. Through the decision of the Constitutional Court Number 18/PUU-XVII/2019 that in order to carry out an execution if the debtor does not wish to voluntarily submit the Fidicuary Guarantee Object, it must be requested to the Chair of the Court and the determination of breach of contract must have an agreement between creditors and debtors or through legal remedies. Then questioned the legal certainty of preferred creditors in the efforts of the parate execution. This legal research is a normative legal research. The analytical method for this type of normative legal research is a prescriptive method using a statute approach and a case approach. This study aims to determine the legal certainty of preferred creditors in the efforts of parate execution of the fiduciary agreement based on UUJF and the legal consequences and judges' considerations which are the basis for deciding the case application for the Constitutional Court Decision Number 18/PUU -XVII/2019. The result of the research concludes that legal certainty has been stated in UUJF for creditors by executing Fidicuary Guarantee if the debtor fails the promise. The certainty is included in the order to "For the sake of justice based on belief in the Almighty God" means it has the same executive power as court decision has obtained permanent legal force. However, in reality the execution process cannot be carried out automatically. so that the execution process becomes longer and it is quite difficult to achieve the executive parameter. The Constitutional Court emphasizes on an agreement on when the breach of contract between creditors and debtors occurs so that creditors can carry out the parate execution. So that it is often used by the Fiduciary to take refuge in the interpretation of the Constitutional Court, which is actually the default clause agreed to in the agreement.

Keywords: Parate Executie, Fiduciary, Preferred Creditor

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A. INTRODUCTION

Fiduciary comes from the word *fides* which means trust. The legal relationship between a debtor providing a fiduciary and a creditor receiving a fiduciary is a legal relationship based on trust. The existence of the Fiduciary Guarantee Institution has been recognized by the Republic of Indonesia Law Number 42 of 1999 concerning Fiduciary Guarantees (hereinafter referred to as the Fiduciary Guarantee Law), which was promulgated on September 30 1999. Fiduciary Guarantees have been used in Indonesia since the Dutch colonial era. until now, as a guarantee born from jurisprudence. This form of collateral is widely used in lending and borrowing transactions because the imposition process is considered simple, easy, fast, but does not guarantee legal certainty.

Agreements with Fiduciary Guarantees have experienced significant developments, for example regarding the position of the parties. In Roman times, the position of the fiduciary recipient was as the owner of the item being fiduciated, but now it is accepted that the fiduciary recipient is only the holder of collateral. Article 1 of the Fiduciary Guarantee Law provides the limitations and definition of fiduciary as the transfer of ownership rights to an object based on trust, with the provision that only the ownership transferred to the fiduciary object remains in the control of the owner of the object (fiduciary). It is said to be based on trust because the object used as collateral remains in the hands or under the control of the owner of the object, namely the party who owes the debt, in this case the debtor (fiduciary).

The Fiduciary Guarantee Institution makes it possible for fiduciary givers to control objects that are guaranteed, to carry out business activities financed from loans using Fiduciary Guarantees, because what is handed over is only the legal ownership rights of these objects *(constitutum possesorium).* Initially, the objects that were used as Fiduciary Security Objects were only limited to tangible movable property in the form of objects in stock *(inventory)*, merchandise, receivables, machine tools and motorized vehicles. In its development, the Fiduciary Guarantee Law provides a very broad understanding regarding Fiduciary Guarantee Objects which includes not only tangible and intangible movable objects, but also immovable objects which cannot be encumbered with mortgage rights as stipulated

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in Law Number 4 of 1996 concerning Mortgage Rights *in conjunction with* the Fiduciary Guarantee Law in Article 1 number 2 which reads:

> "Fiduciary Guarantee is a security right for movable objects, both tangible and intangible, and immovable objects, especially buildings which cannot be encumbered with mortgage rights as intended in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the fiduciary, as collateral for the repayment of certain debts, which gives the fiduciary recipient a preferential position over other creditors."

This Fiduciary Guarantee is an agreement which is an accessory to a main agreement as stated in the explanation of Article 6 letter b of Law Number 42 of 1999 and must be made by a notarial deed which is referred to as a Fiduciary Guarantee deed, but in Article 11 of the Guarantee Law Fiduciaries explained that a notarial fiduciary agreement is not enough but must also be registered at the Fiduciary Registration Office.

A credit agreement with Fiduciary Guarantee is not a security right that arises based on law, but rather arises because it must be agreed upon first. Therefore, juridically, the binding of Fiduciary Guarantees is more special, when compared with guarantees created based on law as regulated in Article 1131 of the Civil Code. The juridical function of binding Fiduciary Guarantee objects in a Fiduciary Guarantee deed is an inseparable part of the credit agreement.

In a Fiduciary Guarantee agreement, both the fiduciary recipient and the fiduciary giver according to the Fiduciary Guarantee Law are equally given legal protection, for the fiduciary giver the form of the right to use the collateral object, and the guarantee giver's breach of promise will not cause the collateral object to change its ownership rights. With the Fiduciary Guarantee Law, preferential rights are given over their receivables and *the droit de suite principle applies* to collateral objects. For third parties, the publicity principle in the Fiduciary Guarantee agreement will provide information about the fiduciary objects.

The focus of attention in the issue of Fiduciary Guarantee is if the debtor breaks his promise . In contract law, if the debtor does not fulfill the contents of the agreement or does not do the things that have been agreed, then the debtor has breached his contract. with all legal consequences. In the Fiduciary Guarantee Law

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there are no strict regulations regarding who must carry out the execution of Fiduciary Guarantee objects and what happens if the Fiduciary Guarantee is executed and what happens if the Fiduciary Guarantee execution is not registered. In fact, Fiduciary Security objects are movable objects whose movement is very risky. As a result, fiduciary recipients find it difficult to implement the droit de suite principle in practice in the field . These obstacles are exacerbated by the practice of implementing fiduciary agreements in the field, including that creditors only stop at making credit agreements, while others only stop at making authentic deeds and do not register them at the Fiduciary Registration Office, as well as frequent negotiations that involve fees. additional for fiduciary recipients when executing Fiduciary Guarantee objects. So a fiduciary certificate does not provide legal education in society. For this reason, in providing legal certainty as a form of legal protection for the parties, a legal rule is needed, when in the field it often happens that the creditor is harmed when the debtor commits a breach of contract or vice versa if the creditor commits an unlawful act, for example by forcefully taking a Fiduciary Security Object.

Fiduciary is a term known for transferring ownership rights to an object whose ownership rights are still under the control of the owner of the object. In the case registered Number 18/PUU-XVII/2019 which was petitioned by Aprilliani Dewi and Suri Agung Prabowo, the Constitutional Court in its decision hearing on Monday 6 January 2020 stated that the petitioners' petition was legally grounded in part regarding the judicial review of Law Number 42 of 1999 concerning Fiduciary Guarantees. During the trial the applicant argued that article 15 paragraph (1), paragraph (2), and paragraph (3) of the Fiduciary Guarantee Law reads:

(1) The Fiduciary Guarantee Certificate as intended in Article 15 paragraph (1) includes the words "For the sake of Justice Based on Belief in One Almighty God";
(2) The Fiduciary Guarantee Certificate as intended in paragraph (1) has the same executorial power as a court decision that has obtained permanent legal force;
(3) If the debtor breaks his promise, the fiduciary recipient has the right to sell the object that is the Object of the Fiduciary Guarantee under his own authority.

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Which according to the applicant is detrimental to his constitutional rights because it conflicts with Article 1 paragraph (3), Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution. At the hearing at the Constitutional Court on Tuesday, March 12 2019, Suri Agung as the applicant stated in the concrete case that his party had experienced the forced taking of a 2004 Toyota Alphard V Model 2.4 A/T by PT Astra Sedaya Finance (hereinafter referred to as PT ASF). Previously, the applicant had entered into a multi-purpose business financing agreement to provide funds for the purchase of one unit of the luxury car. In accordance with the agreed agreement, the applicant is obliged to pay a debt to PT ASF as a creditor worth Rp. 222,696,000,- with installments over 35 months starting from 18 November 2016. During the period from 18 November 2016 to 18 July 2017 the applicant had paid the installments dutifully, but on 10 November 2017 PT ASF sent a representative to collect the vehicle. on the grounds of breach of contract. Due to this treatment, the applicant submitted a letter of complaint regarding the actions taken by PT ASF, but it was not responded to until there were several subsequent unpleasant treatments.

Receiving this treatment, the applicant attempted to take legal steps by filing a case at the South Jakarta High Court on April 24 2018 with a lawsuit against the law. The court granted the applicant's claim by stating that PT ASF had committed an unlawful act, but on January 11 2019 PT ASF again forcibly towed the applicant's vehicle in the presence of the police. Due to this forced treatment, the applicant believes that PT ASF is hiding behind the article being tested in the *a quo case* . Even though the court's decision is higher than the law, the applicant is of the opinion that there is no compelling juridical reason for the PT. ASF to take coercive action.

This is what the panel of Judges said in the decision pronouncement hearing which stated that the execution of the Fiduciary Guarantee cannot be carried out by the fiduciary recipient (creditor) himself, but must submit an application to the district court. Because it often results in acts of coercion and violence from people who claim to be the party who has the authority to collect debts from debtors. It can even give rise to arbitrary actions carried out by fiduciary recipients (creditors) so

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that there is unconstitutionality in the norms regulated in the Fiduciary Guarantee Law.

Based on the background above, the author is interested in analyzing what is outlined in the form of a thesis with the title "Legal Certainty of Preferred Creditors in Efforts *to Execute* Fiduciary Agreements According to Law Number 42 of 1999 concerning Fiduciary Guarantees (Case Study of Constitutional Court Decision Number 18/PUU- XVII/2019)".

1. Formulation of the problem

Based on the background described above, there are several problem formulations, namely:

1) What is the legal certainty for preferred creditors in their efforts *to execute* fiduciary agreements if a breach of contract occurs?
2) What are the legal consequences and considerations of the judge in deciding the petition for Constitutional Court Decision Number 18/PUU-XVII/2019?

2. Research methods

This research is normative legal research. According to Marzuki (in Poesoko, 2013: 20) "as legal research in academic activities, it is intended to differentiate legal research in relation to practical activities which are more directed at solving practical legal problems" [1]. According to Cohen (in Marzuki, 2016: 57) it is said that " *Legal Research is the process of finding the law that governs activities in human society"* [2]. If interpreted freely, legal research is the process of discovering laws that apply in social life activities.

know-how activity in legal science, not just *know-about* . As a *know-how* activity , legal research is carried out to solve the legal issues faced [3]. "

[1] Herowati Poesoko, *Legal Dynamics of Parate Executie Objects of Mortgage Rights* , Yogyakarta: Aswaja Pressindo, 2013, p. 20.

[2] Peter Mahmud Marzuki, *Legal Research* , Jakarta: Prenadamedia Group, 2005, p.57.

[3] *Ibid.* p.60.

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"The field of legal science has a distinctive character, namely its normative nature," [4]this opinion was expressed by Hadjon (in Poesoko, 2013: 20). According to Meuwissen (in Poesoko, 2013: 20-21) legal science has distinctive characteristics [5]:

> "The distinctive (*sui generis*) nature of legal science has the following characteristics: (a) it is empirically analytical, namely explaining and analyzing the content and structure of law; (b) systematization of legal phenomena; (c) interpreting the substance of applicable law; (d) assessing the applicable law, and (e) the practical meaning of legal science is closely related to its normative dimension."

If we look at the substance of the research, according to Marzuki (in Poesoko, 2013: 21) "legal research can be divided into normative and doctrinal research" [6]. Normative research takes the form of research on statutory regulations, jurisprudence, contracts, and legal values that exist in society. Research into legal values that exist in society is sometimes also called empirical legal research. Meanwhile, doctrinal legal research is research into legal principles, legal literature, the views of highly qualified legal scholars, and comparative legal activities. So this research is intended to answer the problems raised with the scope of academic legal research which contains a normative and doctrinal nature.

In legal research there are several approaches. According to Marzuki (2016: 133), the approaches used in legal research are the statutory approach , the case approach , the historical approach , the comparative *approach* and the conceptual approach. *conceptual approach*) [7]. The author in this legal research uses a statutory approach and a case approach. With this approach, information will be obtained from various aspects regarding the issue that is being tried to find an answer.

The analytical method for this type of normative legal research is a prescriptive method. According to Marzuki (2016; 251) provides a prescription regarding what should be the essentials of legal research, because that is what legal

[4]Herowati Poesoko, *Op.cit .*, p. 20
[5] *Ibid.* h. 20-21
[6] *Ibid.* h. 21
[7] Peter Mahmud Marzuki, *Op.cit.,* p. 133.

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research is carried out for [8]. Adhering to the characteristics of legal science as an applied science, the prescriptions given in legal research activities must be able and possible to be implemented. Thus, the prescription given is not something that has been implemented or already exists. Therefore, according to Marzuki (2016; 251) "the resulting legal research is not a new legal principle or a new theory, at least a new argument [9]. "

According to the Big Indonesian Dictionary, prescriptive means giving instructions or provisions; depend on or according to the applicable official provisions. According to Marzuki, as a prescriptive science, legal science studies the objectives of law, legal concepts and legal norms. Legal research is carried out to solve the legal issues being studied. The result that will be achieved is to provide a prescription regarding what should be. So that the results of the analysis can provide an assessment of whether the object under study is right or wrong, or what should be according to the law.

B. DISCUSSION

1. Legal Certainty of Preferred Creditors in Efforts *to Execute* Fiduciary Agreements in the Event of a Default

Laws are a collection of legal norms that are based on legal principles. In order for legal norms to protect human interests and create order in society, laws must be enforced. Although enforcement has encountered obstacles. This is in accordance with the adage uttered by Ferdinand I " *fiat justitia et pereat mundus* " which means let justice be upheld, even though the world will perish. Law enforcement includes 3 elements, namely legal certainty, legal benefits and legal justice. Legal certainty is intended for humans, not vice versa, humans are intended for legal certainty. Without legal certainty, it is impossible for human interests to be protected and order will not be realized in society.

According to Kamello (2014: 117) in a law, legal certainty includes two things, namely:

[8] *Ibid.,* p. 251.
[9] *Ibid.*

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> "First, certainty in the formulation of legal norms and principles that do not conflict with each other, both from the articles of the law as a whole and in relation to other articles that are outside the law. Second, certainty in implementing the legal norms and principles of the law."

If the formulation of legal norms and principles already has legal certainty but only applies juridically, in the sense that it is only for the sake of the law, it means that legal certainty never touches the community. In other words, such regulations are called dead legal norms or only serve as juridical decoration in human life.

If a law has legal certainty, this does not mean that it does not cause problems in implementing the law. In implementing this law, it will be seen how legal certainty in its implementation has binding power on the community. Will it be effective when the law is implemented?

The implementation of a law can be enforced by the state, but it can also be recognized and accepted by society. So sociologically, the effectiveness of a legal certainty contained in a law is if the law has been implemented and accepted by society. If the legal norms in the law experience obstacles in their implementation, then it cannot be said that legal certainty has been running perfectly. Thus, it can be concluded that the issue of legal certainty lies in the substance of the law, the subject of its implementation, namely the law implementing apparatus, the subject of the recipient of the law, namely the community and the facilities provided for the implementation of the law.

Fiduciary guarantee is one of the material security rights. One of the characteristics of a material guarantee agreement is preferential rights. According to Law Number 42 of 1999 Article 27 paragraph (2) "what is meant by preferential right is "the right of the fiduciary recipient to collect repayment of his receivables from the proceeds of the execution of the object which is the Object of the Fiduciary Guarantee." So preferential rights are an inherent characteristic of Fiduciary Guarantees. The preferential rights arising from this Fiduciary Guarantee agreement are not born of law but are agreed upon. In the explanation of the Fiduciary Guarantee Law number three, "in this law, registration of Fiduciary

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Guarantee is regulated in order to provide legal certainty to interested parties and registration of Fiduciary Guarantee gives the fiduciary recipient preferential rights over other creditors. Preferential rights in a fiduciary agreement arise when the fiduciary is registered at the fiduciary registration office. So, as long as the Fiduciary Guarantee is not registered at the fiduciary registration office, the fiduciary recipient does not have preferential rights but rather concurrent rights.

The Fiduciary Guarantee Agreement applies *the droit de suite* or *zaaksgevlog principle* , namely that the fiduciary guarantee remains with the object that is the Object of the Fiduciary Guarantee in the hands of whoever the object is in. This shows that fiduciary guarantees are material rights " *zakelijkrecht* " and not individual rights " *personlijkrecht* ". Thus, fiduciary rights can be maintained against anyone and they have the right to sue anyone who interferes with these rights. Recognition of the principle that fiduciary security rights follow the object in the control of whoever the object is in provides legal certainty for creditors holding fiduciary collateral to obtain debt repayment from the sale of the Fiduciary Security Object if the debtor or fiduciary breaches their contract. Legal certainty regarding these rights is not limited to the debtor providing the fiduciary but when the Fiduciary Collateral Object has been transferred to a third party.

According to the Civil Code, preferential rights are given to privileged *creditors* . In Article 1133 of the Civil Code, *privilege rights* arise from pledges and mortgages. The question is that Fiduciary Guarantee is not listed in the Civil Code, but by analogy the birth of a fiduciary begins with a pledge. After the emergence of the Fiduciary Guarantee Law, it became clearer and more explicit that creditors receiving fiduciaries have preferential rights. This is stated in Article 27 Paragraph (2) of the Fiduciary Guarantee Law. Even the priority rights of the fiduciary recipient are not extinguished due to bankruptcy and/or liquidation of the fiduciary recipient.

One of the characteristics of a Fiduciary Guarantee is the ease of execution if the fiduciary breaches his promise. The Fiduciary Guarantee Certificate has

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executorial rights with the inclusion of the instructions "FOR JUSTICE BASED ON THE ALMIGHTY GOD". As Article 15 Paragraph (2) of the Fiduciary Guarantee Law states, a Fiduciary Guarantee Certificate has the same executorial power as a court decision that has obtained permanent legal force. What is meant by "executorial power" is that it can be exercised directly without going to court and is final and binding on the parties to implement the decision. One of the characteristics of a fiduciary guarantee is that it is easy to execute, so it is given executorial rights by including the duties mentioned above. Therefore, in drafting the Fiduciary Guarantee Law, it was deemed necessary to specifically regulate the execution of Fiduciary Guarantees through the execution parate institution.

Parate Executie according to Subekti in Poesoko (2013: 4) is: "executing oneself or taking what is rightfully one's own, in the sense of without the intermediary of a judge, which is intended for a collateral item and then selling the item oneself". *Parate Executie* is the easiest and fastest way for creditors to recover their receivables, rather than going through court proceedings.

The principle underlying *parate execution* as a means of accelerating the repayment of debtors' receivables from creditors is the principle of legal protection for the holder of the first security right. The realization of the principle of legal protection is reflected in the implementation of *parate executie* , the ease and efficiency, and low costs of recovering creditor receivables, compared to court processes which take a long time and are not cheap. Thus, it is appropriate for creditors to use *parate execution* as a means of accelerating the repayment of debtors' debts. *Parate execution* should accelerate the repayment of debts owed to creditors by debtors and creditors, which can be effective and efficient when debtors break their promises. So that it can facilitate the distribution of capital and can help economic growth today.

With an executorial title that is equated with a court decision that has permanent legal force, it will give rise to a juridical provision that the holder of a Fiduciary Guarantee Certificate has the same status as the holder of a court decision that has obtained permanent legal force. So that the holder of the Fiduciary

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Guarantee Certificate has the authority to carry out *parate execution* of the Fiduciary Guarantee Object. Bearing in mind that the Objects of Fiduciary Collateral are more movable objects that are very easy to move and objects in the control of the debtor, so there is more potential for the Objects of Fiduciary Collateral to be transferred, especially as a result of breach of contract which causes losses to creditors. This executorial power is a legal power that applies to both parties binding themselves to each other.

Executorial power as a legal norm has provided legal certainty for both parties in carrying out legal actions. Which aims to have a broader agreement with the aim of avoiding losses for both parties. Matters that are agreed upon between the two parties become the executorial powers outlined in the Fiduciary Guarantee Certificate which, if there is a breach of contract, can be executed *parate executie* without having to go through a court decision first.

2. Legal Consequences and Judges' Considerations in Deciding on the Constitutional Court Decision Case Number 18/PUU-XVII/2019

Legal consequences according to the legal dictionary are consequences arising from legal relationships. Meanwhile, a legal relationship is a relationship that is regulated by law and has legal consequences. Constitutional Court based on Article 24C Paragraph (1) of the 1945 Constitution, Article 10 Paragraph (1) letter a of Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court (Gazette State of the Republic of Indonesia of 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226), and Article 29 paragraph (1) letter a of Law Number 48 of 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076), the Court has the authority, among other things, to adjudicate at the first and last level whose decision is final to review laws against the 1945 Constitution. In terms of applications for judicial review of Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Guarantees Fiduciary to the 1945

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Constitution with case registration Number 18/PUU-XVII/2019 submitted by Aprilliani Dewi and Suri Agung Prabowo, the Constitutional Court has the authority to hear the application for judicial review.

The fundamental condition for the enactment of a legal norm is the existence of the principles of certainty and justice. In the context of Law Number 42 of 1999 as a form of legal protection for parties who are legal subjects and objects that are collateral in Fiduciary Guarantee agreements.

The Fiduciary Guarantee agreement contains principles, the principles of the Fiduciary Guarantee agreement are:

1. The definition of fiduciary is the transfer of ownership rights to an object based on trust, provided that the object whose ownership rights are transferred remains in the control of the owner of the object. From this understanding, the Fiduciary Guarantee has the same executive power as a court decision which has permanent legal force.
2. Fiduciary guarantee is a guarantee that gives priority position to the holder, in this case the fiduciary recipient, which means the delivery of the collateral object in *constitutum posseisorium* , where the delivery to the fiduciary recipient or creditor is the ownership right to the object on the basis of trust, while the physical object that is the object of the guarantee remains in the control of the fiduciary.
3. A Fiduciary Guarantee is an accessory agreement , which means that the main agreement is a loan agreement or other agreement that can be valued in money as long as the object of the fiduciary agreement is a movable object, either tangible or intangible, or an immovable object, especially a building. cannot be encumbered with mortgage rights.
4. Fiduciary Guarantee contains the principle of preference, which means that the creditor who receives the fiduciary has the position of a creditor who has priority over other creditors (principle of *droit de preference*). In addition, the principle is also attached that the Fiduciary Guarantee remains with the object that is the Object of the Fiduciary Guarantee in the hands of whoever the object is in (principle *droit de suite* or *zaaksgevolg*) as well as the principle that Fiduciary Guarantee is *an accessory* , which means that Fiduciary Guarantee is a subsidiary agreement.
5. Fiduciary Guarantee contains publicity requirements which are absolute or absolute, which means that the Fiduciary Guarantee has binding and executory force after the fiduciary agreement has been registered and a Fiduciary Guarantee Certificate has been issued which contains the words "FOR JUSTICE BASED ON THE ALMIGHTY GOD". Thus, the Fiduciary Guarantee Certificate has the same executive power as a court decision which has permanent legal force.

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The Fiduciary Guarantee Agreement is entered into by the giver of fiduciary rights, in this case called the debtor, and the recipient of the fiduciary rights, which in this case is called the creditor. The fiduciary right is given by the debtor to the creditor as a guarantee for the existence of a legal relationship between debts and receivables which is the main agreement with the aim of ensuring that the creditor obtains a guarantee of claim rights in fulfilling the payment of the debtor's debt which can be done by executing the collateral. One of the characteristics of a fiduciary agreement is that there is a transfer of ownership rights to goods which are collateral from the debtor to the creditor so that legally it appears as if the goods under the control of the debtor have actually transferred their ownership rights to the creditor.

parate execution being ineffective or even very unlikely as interpreted by the Constitutional Court which interprets Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees along the phrase " executorial power" and the phrase "the same as a court decision that has permanent legal force" is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not interpreted as "for fiduciary guarantees where there is no agreement regarding breach of contract and the debtor objects to handing over voluntarily, the object that becomes fiduciary collateral, then all legal mechanisms and procedures in carrying out the execution of the Fiduciary Guarantee Certificate must be carried out and apply in the same way as the execution of a court decision which has permanent legal force." This can eliminate the nature of fiduciary guarantees, namely ease of execution. So the effort that can be taken is through a court decision process that has permanent legal force. In the explanation of Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees that as long as the phrase "executorial power" is contrary to the 1945 Constitution and has no binding legal force as long as it is not interpreted as "towards fiduciary guarantees where there is no agreement regarding breach of contract and the debtor objects handing over the object which is the fiduciary guarantee, then all legal mechanisms and procedures in carrying out the execution of the Fiduciary Guarantee Certificate must be carried out and apply in the same

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way as the execution of a court decision which has permanent legal force." Sometimes not all debtors can admit that they have breached their contract, this right will make things difficult for creditors, in this case as fiduciary recipients who have to take the route of executing court decisions that have permanent legal force. So the instructions " For Justice Based on Belief in One Almighty God " on the Fiduciary Guarantee Certificate become ineffective and inefficient as the nature of the Fiduciary Guarantee is that it is easy to execute.

Article 15 paragraph (3) of Law Number 42 of 1999 was interpreted by the Constitutional Court in Decision Number 18/PUU-XVII/2019 that as long as the phrase "breach of promise" is contrary to the 1945 Constitution and does not have binding legal force as long as it is not interpreted as meaning "there is a breach of promise." not determined unilaterally by the creditor but rather on the basis of an agreement between the creditor and the debtor or on the basis of legal action to determine whether a breach of contract has occurred."

According to Poesoko (2013; 121) "every agreement that arises from an agreement contains a set of rights and obligations that must be implemented or fulfilled by the parties, which is called performance". Then Harahap (1986; 56) states that "keeping up (*nakoming*) means fulfilling the contents of the agreement, or the broader meaning of "paying off" (*betalingi*) implementation of the agreement, namely perfectly fulfilling all the contents and objectives of the provisions in accordance with the wishes agreed upon by the parties." Article 1234 of the Civil Code states that "every agreement is to give something, to do something, or not to do something", so it can be seen that the Civil Code emphasizes the obligation to fulfill the agreement, namely in the form of an obligation to give something, do something and/or not to do something. Meanwhile, the opposite of achievement is a breach of promise. Meanwhile, according to Subekti, the forms and conditions for fulfilling a breach of contract are:

1. Not doing what he said he would do. The debtor does not do what he has agreed to do as per the agreed agreement.
2. Carries out what it promises, but not as promised. The debtor carries out but not in accordance with what has been agreed. As well as carrying out some of what has been agreed.

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3. Did what was promised but was late. The debtor carries out what has been agreed but the specified time has passed. Doing something that according to the agreement you are not allowed to do. It is said to be a breach of contract if one of the parties does something that according to the agreement is not permitted to be done.

It is appropriate for creditors to be able to carry out execution of Fiduciary Collateral Objects after the debtor breaks his promise. However, after the *a quo decision* determines the breach of contract, an agreement must be reached between the creditor and debtor. In order for a breach of contract to be declared, Article 1238 of the Civil Code can be taken into account which states "the debtor is negligent, if he has been declared negligent by an order or a similar deed, or for the sake of his own agreement, if this stipulates that the debtor must deemed negligent by the expiration of the specified time". Thus, the debtor is considered negligent or in breach of contract if after the time period stipulated in the agreement has elapsed, the debtor has not yet carried out his achievements or the creditor has given a warning to the debtor to carry out his achievements, but the debtor has not done so. A breach of promise can be in the form of not carrying out what was promised, carrying out what was promised but not as it should, carrying out what was promised but was late and doing something that according to the agreement should not be done. From this statement, it is actually quite simple to prove whether the debtor has broken his promise or not, so the Constitutional Court's decision rules out the nature of fiduciary guarantees for ease of execution.

3. Fiduciary Recipients Have Preferential Rights Over Fiduciary Guarantee Objects

As explained above, preferred creditors have the right to take precedence. As regulated in the General Provisions Article 1 number 2 of Law Number 42 concerning Fiduciary Guarantees that:

> "Fiduciary guarantee is a security right for movable objects, both tangible and intangible, and immovable objects, especially buildings which cannot be encumbered with mortgage rights as intended in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the Fiduciary Giver, as collateral. for the repayment of certain debts, which gives the Fiduciary Recipient a preferred position over other creditors."

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The Fiduciary Recipient has preferential rights over the Fiduciary Guarantee Object, which right is the right to collect the receivables for the proceeds of the execution of the object that is the Fiduciary Guarantee Object. It can be understood that the Fiduciary Guarantee agreement is a subsidiary agreement to a main agreement, namely a debt and receivables agreement.

Often the Fiduciary Recipient, in this case the creditor, experiences losses due to a breach of promise committed by the Fiduciary Giver, in this case the debtor. Bearing in mind that to support national economic development by distributing capital, financial institutions are required to be able to manage and distribute capital to the community on an ongoing basis in order to create a just and prosperous Indonesian society based on Pancasila and the 1945 Constitution. Fiduciaries will suffer a lot of losses because in carrying out the execution there will be greater costs. Not to mention, if the Fiduciary Guarantee Object has been executed, it cannot be sold or auctioned immediately. Sales of objects that are the object of Fiduciary Guarantee can be carried out through public auctions and through private sales carried out based on an agreement between the Giver and the Fiduciary Recipient. We can see underhand sales in Article 29 paragraph (2) of Law Number 42 of 1999 that:

> "The sale as intended in paragraph (1) letter c shall be carried out after 1 (one) month has passed since being notified in writing by the Giver and/or Recipient of the Fiduciary to interested parties and announced in at least 2 (two) newspapers distributed throughout the area concerned".

It can be concluded that the risk borne by the Fiduciary Recipient is higher and with collateral, movable objects which are very easy to move have become more complex after the Constitutional Court Decision Number 18/PUU-XVII/2019 by interpreting the phrase "executorial power" must be interpreted as if there is no agreement. regarding breach of contract and the debtor's objection to voluntarily handing over the Fiduciary Guarantee Object, then all legal mechanisms and procedures in carrying out the execution of the Fiduciary Guarantee Certificate must be carried out and apply in the same way as the execution of a court decision which has permanent legal force. Furthermore, the existence of a breach of contract is not determined unilaterally by the creditor but must be agreed upon or on the

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basis of legal action first to declare a breach of contract. This will add confusion to the practices of financial institutions in carrying out business capital turnover. Besides that, it will also increase operational costs if you carry out the execution of the Fiduciary Guarantee Object.

C. CONCLUSION

Based on research and discussion, the following conclusions can be drawn:

1. The legal certainty of preferred creditors has been stated in Law Number 42 of 1999 concerning Fiduciary Guarantees with the imposition of Fiduciary Guarantees registered at the Fiduciary Registration Office. The Fiduciary Registration Office issues a Fiduciary Guarantee Certificate which includes the words "For the sake of justice based on belief in the Almighty God" which means it has the same executorial power as a court decision that has obtained permanent legal force. The legal certainty of preferred creditors also does not disappear if the Fiduciary Giver is declared bankrupt or liquidated, the Bankruptcy Law stipulates that objects that are the object of Fiduciary Collateral are outside bankruptcy and liquidation. Executorial rights arise if there is a breach of promise by the Fiduciary. Execution can be carried out by carrying out executorial title and *parate executie* . In order to carry out the execution, the Fiduciary Giver is obliged to hand over the objects that are the object of the Fiduciary Guarantee. However, in reality the legal certainty that has been stated in Law Number 42 of 1999 concerning Fiduciary Guarantees is not fully implemented as regulated. In fact, the Constitutional Court Decision Number 18/PUU-XVII/2019 makes the process of executing Fiduciary Guarantee Objects longer and quite difficult to achieve *parate execution.*
2. Constitutional Court Decision Number 18/PUU-XVII/2019 which states that if the Fiduciary Giver does not admit that there is a breach of promise and objects to voluntarily handing over the Fiduciary Security object, procedures or procedures must be carried out as intended in Article 196 HIR or Article 208 RBg . This means that the Fiduciary Recipient is very limited in carrying out *parate execution* on Fiduciary Guarantee objects which formally belong to him

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or herself as a result of the interpretation of the Constitutional Court as stated in the Constitutional Court Decision Number 18/PUU-XVII/2019. This can be used by the Fiduciary Giver to take refuge in the interpretation of the Constitutional Court's decision, which in fact is specified in the Fiduciary Agreement in detail when the Fiduciary Giver is declared to be in breach of contract.

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